No. 80-381

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Supreme Court of the United States

October Term, 1980

JOHN DI GILIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. In a competency hearing pursuant to 18 U.S.C. §4244 is due process violated where the burden of proof is placed on defendant to prove the specific organic cause for incompetency rather than on the Government to prove competency in accordance with the *Dusky* test?

II. May a verdict of criminal guilt beyond a reasonable doubt stand where there is a reasonable doubt as to defendant's competency to defend himself?

PARTIES

The parties before the Third Circuit were the United States of America and petitioner John DiGilio. The other named co-defendants did not participate in the appeal to the Third Circuit.

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OPINIONS BELOW

A copy of the Third Circuit's opinion at 538 F. 2d 972 (1976) is appended. Although not the decision which is the direct subject of this writ, it was the decision which reversed the trial judge's original finding of competency and remanded with instructions for a *nunc pro tunc* determination of competency-to-be-tried, if possible, and a determination of competency throughout the trial and for sentencing.

Opinions relevant to this petition are the original determination of competency-to-be-tried rendered by the trial judge in an unreported decision dated June 19, 1975; a *nunc pro tunc* determination of competency throughout the trial in an unreported decision dated November 2, 1977 and a determination of competency to be sentenced in an unreported decision dated October 10, 1979. Copies of all three opinions are appended.

JURISDICTION

(a) The judgment sought to be reviewed was dated and entered July 15, 1980. It affirmed, without opinion, the conviction and sentence herein including the trial judge's *nunc pro tunc* determination that petitioner was competent to be tried and a second determination after a new hearing that petitioner was competent to be sentenced.

(b) By order dated and entered August 6, 1980 the Third Circuit denied a petition for rehearing but by order dated and entered August 15, 1980 stayed the mandate affirming his conviction and sentence until September 5, 1980 to permit this petition to be filed.

(c) Jurisdiction to review the judgment in question by certiorari is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due process clause of the Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The right to counsel provision of the Sixth Amendment:

> "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

18 U.S.C. §4244, a copy of which is appended hereto.

STATEMENT OF THE CASE

Petitioner was indicted by a federal grand jury (No. 74-314) for soliciting the theft of Government documents. The issue of his competency to be tried was raised and the trial judge, Hon. H. Curtis Meanor, sent him to Carrier Clinic for evaluation. A 18 U.S.C. §4244 hearing was then had in June of 1975.

Three psychiatrists testified at the hearing:

For the Government:

Dr. Spitzer, a board certified psychiatrist and clinical director of Carrier Clinic was hired by the Government. He examined 700 pages of medical records and psychological reports and spent 25 hours evaluating petitioner. He concluded that petitioner was not only not competent to stand trial but also was incompetent to handle his affairs and should be committed.

Dr. Flicker, board certified in both psychiatry and neurology was also hired by the Government and after reviewing the Carrier Clinic records and examining petitioner, he could not determine if he was competent or incompetent.

For the petitioner:

> Dr. Gagliardi, a Diplomate of Psychiatry and Neurology spent 25 hours examining petitioner and concluded that he was incompetent to be tried.

As Judge Meanor observed, "Two say he is incompetent and one says he can't tell" (6/19/75 T53).

In addition to the psychiatric testimony, Dr. Taub, a clinical psychologist (not board certified) (6/12/75 T23) testified for the Government. He had not seen petitioner at Carrier Clinic but had seen him for 45 minutes a year earlier when petitioner was at the medical center in Springfield, Missouri for evaluation in an unrelated matter (6/12/75 T96). Dr. Taub took part in group and individual psychological testing and prepared reports for the court (6/12/75 T7-T11).

All the doctors came to the conclusion that petitioner had organic brain syndrome (physical organic brain damage) (6/6/75 T79, 6/12/75 T18, 6/8/75 T130). An autopsy would show lesions of the nervous system (6/6/75 T80) and petitioner's conduct and test results were consistent with this diagnosis (6/6/75 T19, T66, T99). Dr. Spitzer characterized the syndrome as one with a psychotic reaction (6/6/75 T8). Dr. Flicker said the syndrome was chronic (6/18/75 T163) and thought there was superimposed on it a Ganser's Syndrome (6/18/75 T130). Dr. Taub diagnosed an organic psychosis (6/12/75 T28).

The doctors recognized that petitioner functions at a marginal level in terms of taking care of himself. His memory is incapable of keeping accurate track of any consecutive basis of recent events (6/6/75 T12). His personality is disorganized and he cannot arrange his thoughts and activities in any constructive, meaningful way (6/6/75 T14). His mentation is impaired

through distinct paranoid trends (6/6/75 T15) and he is unable to perceive abstract relationships and unable to concentrate (6/6/75 T16). In addition, his I.Q. is a below-average 68 (6/6/75 T20). He cannot play cards because he cannot remember what beats what (6/6/75 T129) and would get lost if he drove a car (6/6/75 T125).

The doctors recognized that the brain damage was traumatic in origin. Petitioner suffered multiple brain and brain stem injuries during his approximately 110 amateur and professional fights. During his career he was twice barred from the ring by the New York Athletic Commission because of head injuries. In addition, a tugboat accident in 1969 and subsequent numerous falls causing head injury caused additional brain damage (6/6/75 T13, T14, T89, T90, 6/12/75 T27, T28, T29). Dr. Spitzer diagnosed the falls as a result of Grand Mal, a form of epilepsy (6/6/75 T13). Dr. Gagliardi believed the organic illness to be dementia (6/6/75 T86) manifested by dysmesia (difficulty with short-term memory, disorientation as to time, place and person, along with difficulty in abstract reasoning). Dr. Gagliardi had personally observed that the seizures resulted in, or were accompanied by elevated blood pressure and heart rate, sweating, dysphasia and hypertension (6/6/75 T93). Dr. Flicker found the symptomology to definitely show not only the presence of organic brain syndrome, but also the manifestation of hysterical elements, and at times, some of the condition appears to be almost schizophrenic in character, and at other times explosive, almost manic (6/18/75 T134, T135). All the doctors considered and ruled out the possibility of malingering (6/6/75 T22, T65, T96, T97, T99, T100, T103, T110, T111, 6/12/75 T19, T31, T89, T114, 6/18/75 T130, T131, T132).

The Government also presented Dr. Lewis, an internist who had only seen petitioner on two occasions for a total of 20 minutes (6/6/75 T133-T138). The first occasion was October 29,

1974 when he saw petitioner in the Intensive Care Unit under sedation and the second occasion was May 1975 when he did not engage in any intensive questioning of petitioner (6/6/75 T149, T150).

Messrs. Armstead and Rockstein, both medical trainee associates at the Federal Detention Headquarters where petitioner was held, confirmed the fainting spells, dizziness, headaches, incoherence and hypertension (6/13/75 T154, T156, T157, T163, T164, T170, 6/16/75 T136, T138, T139, T150, 6/17/75 T50). Dr. Flores, another medical trainee associate, witnessed petitioner black out, manifest slurring speech and "go into another dimension . . . his eyes rolled back in his head" (6/18/75 T183). He sutured him at least twice from falls (6/18/75 T185) and said that petitioner had occasionally urinated on himself (6/18/75 T194). Sgt. Weingartner had also seen petitioner experience a seizure (6/18/75 T18).

Lastly, the court considered a 1974 report by Dr. Emasue Snow. Dr. Snow had also seen petitioner a year earlier at Springfield. She concluded competency to stand trial, but she never testified and her credentials were never made known to the court. Her report was included in the Springfield records which had been reviewed, and apparently disregarded by the three psychiatrists.

The trial judge recognized that petitioner "is extremely mentally deficient" (6/19/75 T72) yet found him competent to be tried. Disregarding all psychiatric experts — both Government and defense experts alike — all of whom were board certified and who spent scores of hours in personal examinations of petitioner, the trial judge adopted Dr. Taub's view ". . . that where Mr. DiGilio is outside a stressful situation he functions at his below-normal range of intelligence" (6/19/75 T77). The trial judge concluded:

> "I *suspect* — and if I have to *predict,* I would find — that Dr. Taub is correct. Once Mr. DiGilio gets behind him more testing by doctors, more testing by psychiatrists, once he recognizes that this hearing is over, that he must go to trial, that his only opportunity to protect himself is to cooperate with counsel, and understand what is going on, that he will rise above that retarded intellectual level. And *if he does,* and I think he will, he will *then* be able to understand the nature of the proceedings against him, understand counsel and cooperate in his own defense." (6/19/75 T79, T80) (Emphasis added.)

During the trial and despite the trial judge's "prediction" that petitioner would rise above his "extremely mentally deficient" condition there was clearly a thing "amiss". When the question of petitioner's taking the stand came up, counsel explained to the court the difficulty in obtaining rational consultation:

> "Mr. Hochieiser: He has made decisions to take the stand and there have been other occasions when I thought he had agreed with me that he ought not to, and then this morning I have enough trouble trying to tell him the jury is the same now as when we started in this case." (6/24/75 T19).

The trial judge's own attempts in this regard confirm the experience of counsel:

> "The Court: All right, have you come to a determination as to whether you want to testify or not?

Mr. DiGilio: Yes, I have to because half the time I don't know what is going on. That is the only way I can clear myself. Changing the jurors on me is not right." (T2415).

* * *

"The Court: Do you understand that we can't make you testify if you don't want to?

Mr. DiGilio: You make me do everything else.

The Court: No, no.

Mr. DiGilio: I don't understand." (T2416).

* * *

"The Court: . . . if you decide to get on that stand and testify then you will be subject to cross-examination by the United States Attorney.

Mr. DiGilio: I am not afraid of Mr. Cranwell or Mr. Robinson.

The Court: You will be subject to cross-examination by the United States Attorney on all subject matters pertinent to this case including the issue of whether you are telling the truth, your credibility.

Mr. DiGilio: I only tell the truth Judge." (T2417-T2418).

To the judge's last attempt to explain his rights petitioner responded "Judge, you confuse me more." (T2418). At the conclusion of the attempt, the judge remarked "The man can't think abstractly?" (T2418). Despite this clear evidence of a thing "amiss" the judge took no steps to investigate and when petitioner's wife finally convinced him not to take the stand, the court considered the matter finished (T2420).

The experience of counsel and the court was perfectly consistent with the psychiatric testimony at the §4244 hearing at which both Drs. Spitzer and Gagliardi opined that petitioner did not have the capacity to make such an abstract decision (6/6/75 T73, T74, T104). At the conclusion of the trial, petitioner was convicted and sentenced to 9 years incarceration and a $10,000 fine.

On appeal to the Third Circuit (No. 75-2218) the court vacated the sentence and remanded in accordance with its opinion at 538 F. 2d 972 (1976). It held, *inter alia,* that the trial judge had committed reversible error in placing the burden of proof on petitioner to prove incompetency and directed a redetermination, if it could be made on the record, with the proper allocation of burden of proof on the Government to prove whether petitioner was competent throughout the trial and for sentencing.

On November 2, 1977 the trial judge rendered a *nunc pro tunc* finding that petitioner was competent to stand trial based on his review of the record of the June 1975 competency hearing. The trial court also dealt with the "thing amiss" incident:

> "Nowhere in his history or in the record is there any credible evidence that he ever was hallucinatory. To believe that the jurors were being changed during the trial is a hallucination.

> That DiGilio suffered from hallucinations previously never has been suggested. The evidence is clear to me that DiGilio is not hallucinatory, and never has been.
>
> * * *
>
> It is incredible that DiGilio should suddenly have become truly hallucinatory for the first time during trial."

The trial court dismissed the thing amiss as simulation based on a clear misstatement of the record and without any hearing whatever. Numerous incidents of hallucinations were contained in the hospital records, psychiatric reports and expert testimony (*see* appendix).

On April 18, 1978 the district court initiated a new competency proceeding for the limited purpose of determining petitioner's competency to be resentenced pursuant to the mandate of the Third Circuit Court of Appeals. The trial court called Dr. Harold M. Somberg, a neurosurgeon, as its expert and not a psychiatrist as is required by 18 U.S.C. §4244. Dr. Somberg was paid by the Government and had originally been a Government witness (T1857).

Petitioner called Drs. Abrahamsen (of Son of Sam fame), Latimer, Kritzberg, Gagliardi, Brown, Smith, Rosner, Thaler and Feinberg as his expert witnesses and the Government called Drs. Feldman and Flicker. In addition, the Government used surreptitiously made recordings of conversations in which petitioner participated. Because of the trial court's ruling, it is not necessary to itemize the testimony of the many experts or to discuss the significance of the tapes or any infringement of

petitioner's Sixth Amendment rights under the doctrine of *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246 (1964) its progeny. Those rights however are not waived.

Essentially, the defense experts testified that petitioner was incompetent and the Government experts, although not as familiar with petitioner, disagreed. One of the defense experts, Dr. Rosner, a neurosurgeon, theorized that the *cause* of the incompetency was a type of blood vessel abnormality called "angioma". The vessels become engorged with blood and produce pressure on the brain. The trial judge reduced the entire proceeding into a determination as to whether or not Dr. Rosner was correct in his angioma theory and viewed as "incidental" all other evidence concerning whether or not petitioner was in fact incompetent *regardless* of cause:

> "Because I find the testimony of Dr. Somberg more credible than that of Dr. Rosner, that there exists no discernible angioma in the right parietal area, and if such a lesion did exist, it would be on the non-dominant side, thus not affecting the intellectual ability and personality of defendant, the psychiatric and psychological evaluations made by the defense witnesses becomes *incidental* to the determination." (Emphasis supplied.)

In other words, the trial judge made the issue of competency to consult with counsel and understand the proceedings "incidental" to petitioner's ability to prove the *cause* of such incompetence. The trial judge then determined that petitioner was competent because he failed to prove the angioma. The rationale of that opinion motivated another writ of mandamus (No. 79-2583) which this court denied on November 13, 1979. On December 14, 1979 petitioner was

resentenced to a 9-month custodial term, a 5-year probationary period, and a $2,000 fine.

On appeal to the Third Circuit Court of Appeals, the trial court's ruling was affirmed, without opinion, by judgment order dated July 15, 1980. On August 6, 1980 the Third Circuit denied petitioner's application for rehearing and by order dated August 15, 1980 the Third Circuit stayed its mandate until September 5, 1980.

REASONS FOR GRANTING THE WRIT

I.

The writ should be granted because the Third Circuit sanctioned a radical departure from due process standards in the application of the *Dusky* test for competence by requiring petitioner to prove the organic cause of incompetency rather than placing the burden of proof on the Government to establish the existence of competency.

The Third Circuit's affirmation of the trial court's finding of competency to be resentenced violated petitioner's due process right to a fair trial as well as its own mandate that the burden of proof be placed on the Government to prove competency.

In *Dusky v. United States,* 362 U.S. 402, 4 L. Ed. 2d 824 (1960) the Court held that the test of competency-to-be-tried is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceeding against him" (362 U.S. at 402).

As the trial court observed: "It is clear that the Dusky test is applicable to a determination of competency to be resentenced."

The prohibition against proceeding against an individual who is incompetent is "fundamental to an adversarial system of justice", *Drope v. Missouri,* 420 U.S. 162, 172, 43 L. Ed. 2d 103 (1975) and failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial, deprives him of his due process right to a fair trial, *Pate v. Robinson,* 383 U.S. 375, 15 L. Ed. 2d 815 (1966). The *Dusky* standard is, consequently, a test of constitutional proportions and defines the limits of due process.

It is clear that the *Dusky* test is a functional test. It concerns only the *effects* of any mental disease, disorder or deficiency and is indifferent to the *cause* thereof. If an individual is not competent by that standard, he is not competent regardless of cause and regardless of whether cause is even known, yet the trial judge made the sole issue the organic *cause* of incompetency rather than the *fact* of incompetency and never addressed the latter in the hearing of competency to be resentenced. In his own words, he stated:

> "In deciding that DiGilio is competent to be resentenced, I find that the *determinative* testimony comes essentially from those witnesses who could testify knowledgeably about the claimed root *cause* of the defendant's problems — his organic brain disease." (Emphasis supplied.)

The hearing on competency to be resentenced was voluminous; the record consisting of 19 volumes of testimony and over 3,000 pages of transcripts of lay witnesses as well as psychologists, psychiatrists, neurologists and neuropsychiatrists. In essence, petitioner presented many experts who testified to the fact of his lack of competency to be sentenced. In addition,

he presented Dr. Rosner, a neurologist, who testified as to his theory of *why* petitioner was incompetent. He theorized that the *cause* of the incompetency was due to a type of blood vessel abnormality called "angioma". The vessels become engorged with blood and produce pressure on the brain.

The trial judge seized on Dr. Rosner's theory of cause and equated it with the ultimate issue of capacity itself: "It is clear to me that DiGilio's claim of incompetency rests entirely on the existence of the angioma". He then pitted Dr. Rosner's theory of cause against conflicting testimony by the Government's neurosurgeon, Dr. Somberg, accepted the latter's version and swept away *all* other evidence of the *actual* existence of incompetency:

> "Because I find the testimony of Dr. Somberg more credible than that of Dr. Rosner, that there exists no discernible angioma in the right parietal area, and if such a lesion did exist it would be on the non-dominant side, thus not affecting the intellectual ability and personality of defendant, the psychiatric and psychological evaluations made by the defense witnesses becomes *incidental* to the determination." (Emphasis supplied.)

In other words, the issue of whether or not petitioner was, in fact, competent to reasonably consult with counsel and understand the proceedings was "incidental" to his ability to prove the *cause* of such incompetence. It is interesting to note that Dr. Rosner's theory attempted to explain the epileptic attacks which petitioner experienced. The attacks were real and personally witnessed by Dr. Gagliardi who testified during the prior competency-to-be-tried hearing that they were accompanied by elevated blood pressure, elevated pulse,

sweating, dysphasia and hypertension (6/6/75 T93). Clearly a rejection of a theorized *cause* does not negate or even fairly address evidence as to *effect*. By analogy, a dead man does not become alive simply because a court rejects the theory of the *cause* of death.

Moreover, the trial court's rejection of petitioner's claim of incompetency based on his rejection of Dr. Rosner's angioma theory was irrational since the trial court knew and pointed out that petitioner was in fact suffering from some sort of organic brain disease:

> "There is no question in my mind that Mr. DiGilio has some form of organic brain disease, probably due to repeated head trauma from his pugilistic endeavors as well as some traumatic incidents that he has undergone since that time."

In other words, despite the trial court's knowledge that petitioner suffered from some form of organic brain damage he ruled that petitioner's failure to correctly identify the type of disease meant that he had no disease at all to support his claim of incompetency. This approach is pure sophistry inconsistent with petitioner's due process right to a fair trial.

The trial judge's approach was all the more unacceptable because of the present state of knowledge of the human mind and how it works. As Chief Justice Burger stated in his concurring opinion in *O'Connor v. Donaldson*, 422 U.S. 563, 45 L. Ed. 2d 396 (1975):

> "Despite many recent advances in medical knowledge, it remains a stubborn fact that there are many forms of mental illness which are not understood. . ."

To the extent that such knowledge does exist in a field of expertise designated by Congress to assist the courts in determining competency, the trial judge failed to utilize same. 18 U.S.C. §4244, which is the statutory basis for the competency hearings, specifies that the court "shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist who shall report to the court." The trial judge violated this mandate by using a neurosurgeon, Dr. Somberg, instead of a psychiatrist.

The trial judge's error in this regard was particularly inexplicable in light of the prior hearings he had conducted on petitioner's competency-to-be-tried. That hearing occurred *before* the introduction of Dr. Rosner and his theory of angioma, yet even the Government's own psychiatrist, Dr. Spitzer, joined with petitioner's psychiatrist, Dr. Gagliardi, in opining that petitioner was incompetent to be tried. There was no talk during that hearing or in the judge's determination that the psychiatric evidence was "incidental" to the ultimate issue.

That earlier hearing on competency-to-be-tried also underscores the fact that a competency hearing does not require any evidence whatever of underlying organic cause for incompetency. While it may certainly be helpful to present such evidence, if known, that aspect of the proofs can in no way alter the ultimate determination required by *Dusky*. To say otherwise, is to permit the tail to wag the dog at the expense of petitioner's due process right to a fair trial.

The Third Circuit's affirmance of the trial court's decision was, therefore, a failure to observe procedures adequate to protect petitioner's right not to be tried while incompetent, and, consequently, a deprivation of his due process right to a fair trial, *Pate v. Robinson, supra.*

Petitioner contends that the Third Circuit's affirmance was also erroneous because of the trial court's failure to apply the "beyond a reasonable doubt" quantum of proof to the competency-to-be-resentenced hearing. Petitioner relies on the arguments made herein on that point with respect to the competency-to-be-tried hearing.

II.

The writ should be allowed so that this Court can define the standard of proof necessary for a determination of competency under 18 U.S.C. §4244.

The Third Circuit erred in affirming the trial court's application of the preponderance of the evidence standard in redetermining that petitioner was competent to be tried. It is logically and, petitioner submits, legally inescapable that the correct standard is "proof beyond a reasonable doubt," or at the minimum "clear and convincing evidence."

The principle that no criminal liability can attach short of a finding of guilt beyond a reasonable doubt is as deeply imbedded in our system of jurisprudence as any can be. Such a standard reflects the values society places on individual liberty, *Addington v. Texas,* 441 U.S. ____, 60 L. Ed. 2d 323, 330 (1979).

It is logically inescapable that guilt can never be established beyond a reasonable doubt when there is a reasonable doubt as to a defendant's capacity to stand trial. This is so because competency to stand trial is, by definition, the ability to consult with counsel with a reasonable degree of rational understanding together with a rational and factual understanding of the proceedings, *Dusky v. United States,* 362 U.S. 402, 80 S. Ct. 788 (1960). When a defendant is incompetent, there can be no

question but that the defense itself is crippled. This Court commented on the problem in *Drope v. Missouri,* 420 U.S. 162, 43 L. Ed. 2d. 103 (1975):

> "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, may not be subjected to a trial. Thus, Blackstone wrote that one who became 'mad' after the commission of an offense, should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried, *'for how can he make his defense?'*
>
> * * *
>
> Some have viewed the common-law prohibition 'as a by-product of the ban against trials in absentia' the mentally incompetent defendant, though physically present in the courtroom, is in reality *afforded no opportunity to defend himself.*
>
> * * *
>
> For our purposes, it suffices to note that the prohibition is *fundamental to an adversary system of justice* [citations omitted]." (420 U.S. 170-172, emphasis supplied.)

To say that the Government need only prove competency to stand trial by a preponderance, means, by definition, that a defendant may permissibly be forced to trial when a reasonable doubt exists as to competency, *i.e.*, when a reasonable doubt exists, whether he is afforded an "opportunity to defend himself."

When a defendant cannot reasonably assist counsel, ammunition necessary for the defense is lost. The problem is exacerbated by defendant's lack of incentive to utilize whatever capabilities he has due to his failure to grasp the nature of the proceedings against him. As a practical matter, this means that most, if not all, of the many procedural and substantive protections available to a defendant are lost or impaired. For example the right of confrontation can be no more meaningful than the ability to *effectively* confront the Government's witnesses. Another example is the right to the effective assistance of counsel. Certainly any counsel's effectiveness would be seriously impaired under such circumstances.

The significance of the loss or impairment of these and other constitutional rights in the trial of an incompetent, is underscored by the fact that on appellate review when a defendant has been deprived of his basic constitutional rights consistent with *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, *reh. den.,* 386 U.S. 987, 18 L. Ed. 2d 241 (1967), the prosecutor must demonstrate that the constitutional error was harmless "beyond a reasonable doubt" in order that the conviction not be reversed, 17 L. Ed. 2d at 710-711. (*See* 3 Wright, Federal Practice and Procedure—Criminal, Section 855, especially footnote 65 and 76.) It makes little sense to say that courts will zealously guard against the effects of constitutional error by utilizing the "beyond a reasonable doubt" standard on appeal, yet invite the wholesale loss or impairment of

constitutional rights in the first instance, by placing defendant in jeopardy where a reasonable doubt exists as to his ability to defend himself.

Certainly utilization of the beyond a reasonable doubt standard in the first instance at trial to protect constitutional rights, is no novelty. For example, in *Shilling v. State,* 86 Wis. 2d 69, 271 N.W. 2d 631 (1978), the court held that any waiver of the right to counsel during interrogation must be proven "beyond a reasonable doubt." That example is, of course, particularly pertinent here since it deals with Sixth Amendment rights.

This Court's recent decision in *Addington v. Texas,* 441 U.S. ____, 60 L. Ed. 2d 323 (1979), points to the same result urged by petitioner. In that case, it was held that the "clear and convincing" standard of proof, was a constitutional requisite consistent with the Fourteenth Amendment due process clause in a state involuntary commitment proceeding. The underlying rationale is no different than in criminal cases: to minimize the risk of an erroneous decision which will result in a loss of liberty. Certainly it is no less repugnant for an innocent defendant to be sent to jail than for a sane person to be involuntarily institutionalized. The liberty of one cannot be more sacred than that of the other. Moreover, any attempt to differentiate the two on the basis of the outstanding criminal charge would run afoul of a defendant's right to a presumption of innocence. In addition, the type of determination is very similar in both cases and since the nature of the proofs involved and the risks of error and potential loss of liberty are all strikingly similar, *Addington* strongly militates in favor of petitioner's position.

Another strong similarity between the *Addington* situation and §4244 hearings is that liberty is in jeopardy in both cases on

the basis of the evidence on competency alone and wholly without regard to any criminal charge. This is so because 18 U.S.C. §4246 provides that upon a finding of incompetency to stand trial the defendant may be deprived of liberty. Clearly, at the very least, the "clear and convincing" standard should be applied to §4244 hearings.

Consequently, this writ should be affirmed to permit this Court to determine this fundamental issue which affects the trials of many criminal defendants.

CONCLUSION

For the above stated reasons it is respectfully urged that the writ be granted.

Respectfully submitted,

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